IN THE HIGH COURT OF JUDICATURE :: CHHATTISGARH :: BILASPUR

WRIT PETITION NO : 1275 OF 2004

PETITIONER : PRAMOD SHARMA
aged 27 yrs : s/o Shri R.S.Sharma
Candidate : Contract Lecturer-MOM
r/o C-6, Radhaswamy Nagar,
Raipur- C.G.

- V E R S U S -

RESPONDENTS

1. STATE OF CHHATTISGARH
Through : The Secretary to the Govt. of
Chhattisgarh,
Technical Education Department,
Mantralay : D.K.Bhavan
Raipur- C.G.

2. THE DIRECTOR
Directorate of Technical Education : Chhattisgarh
Womens' Polytechnic College Campus,
Byron Bazar : Raipur C.G.

3. THE PRINCIPAL,
Government Polytechnic College,
Durg - C.G.

4. THE PRINCIPAL
Government Womens' Polytechnic College,
Jagdalpur - C.G.

5. SHRI KISHORE KUMAR SAHU
Lecturer : MOM
Government Polytecnic College,
Durg - C.G.

6. SHRI P.K.SINGH
Government Polytechnic College,
Jagdalpur - C.G.

7. SHRI SULABH JAIN
Government Womens' Polytechnic College
Jagdalpur - C.G.

P. R. No. 1263/04
Presented by Shri Anurag Sharma
dated 25-8-04

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Clerk to A.G. Bilaspur

30/4/04

WRIT PETITION UNDER ARTICLE 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF WRIT/DIRECTION

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition No. 1275 of 2004

Petitioner — Pramod Sharma

Versus

Respondents — State of Chhattisgarh and others

Post for order on 27th June, 2006.

Sd/-
Satish K. Agnihotri
Judge

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition No. 1275 of 2004

Petitioner — Pramod Sharma

Versus

Respondents — State of Chhattisgarh and others

SB: Hon'ble Mr. Justice **Satish K. Agnihotri, J**

Shri Anurag Shrivastava, Advocate for the petitioner.

Shri V. V. S. Moorthy, Deputy Advocate General with Shri I. N. Shrivastava, Panel Lawyer for the respondents No. 1 to 4.

Shri Ravish Verma, Advocate for the respondents No. 5 and 6.

Shri Ratan Pusty, Advocate for the respondent No.7.

O R D E R

(27th June, 2006)

The following order of the Court was passed by **Satish K. Agnihotri, J.**

1. The present petition filed under Article 226/227 of the Constitution of India impugns the order No. F 1-26/2003/42 dated 28.2.2004, whereby the Chhattisgarh Technical Education Three Years Contract Service (Recruitment and Conditions of Service) Rules 2002 (hereinafter referred to as 'the Rules 2002') was amended to the extent of appointing part-time Lecturers, working in engineering colleges/polytechnic colleges, without going through the provisions of examination/test, provided under Rule 4 of the Rules, 2002.

2. The factual position, in nutshell, are that the Directorate of Technical Education, Chhattisgarh published an advertisement (Annexure P/2), inviting applications for the post of Lecturer/AWS/Programmer on contract basis in engineering colleges and polytechnics under Directorate of Technical

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Education Chhattisgarh, stating that the recruitment to the said posts would be in accordance with the provisions of the existing Rules 2002. The last date for submission of the application was notified to be 31st May, 2003. The petitioner along with other candidates submitted an application for appointment on the post of Lecturer. The call letter dated 7.2.2004 (Annexure P/3) was issued to the petitioner, intimating him to appear for the interview on 16.2.2004 at 10.00 a.m. in Engineering College, Raipur. The petitioner, along with others, appeared in interview accordingly on 16.2.2004.

3. According to the petitioner, the name of the petitioner was at serial number 3 in the merit list, against the four available seats.

4. In a communication to the petitioner with regard to the appointment, it was found that the respondents No. 5, 6 and 7, who were working as part time Lecturers, were appointed without going through the required test/interview as prescribed under the provisions of Rule 4 of the Rules, 2002, on the basis of the impugned order dated 28.2.2004 (Annexure P/1).

5. Being aggrieved, the petitioner has impugned the order dated 28.2.2004 in this petition and further sought for quashing of the appointment of the respondents No. 5, 6 and 7 on the post of Lecturer, being unconstitutional, illegal and contrary to the provisions of Rules, 2002. The petitioner has further prayed for a writ of mandamus against the respondent No.1 to declare the result on the basis of the select list and appoint the petitioner accordingly.

6. Shri Anurag Shrivastava, learned counsel appearing for the petitioner submitted that the appointment of the respondents No. 5, 6 and 7 on the basis of the order dated 28.2.2004 (Annexure P/1) is contrary to the provisions of the existing Rules 2002. It was further submitted that the executive order is invalid as the same is contrary to the provisions of the Rules, 2002, therefore, the appointment of the respondents No.5, 6 and 7 is illegal, unconstitutional and contrary to the provisions of law.

7. Shri V. V. S. Moorthy, learned Deputy Advocate General with Shri I. N. Shrivastava, learned Panel Lawyer, appearing for the respondents No. 1 to 4, on the contrary, submitted that the petitioner has no right to be appointed, even if the petitioner's name found place in the select list. It was further contended that the order dated 28.2.2004 (Annexure P/1) was a policy decision of the State Government with the public purpose to grant benefit to the part time Lecturers by appointing them on regular basis against full time posts directly. Hence, no fault could be found with the order dated 28.2.2004.

8. Shri Ravish Verma, learned counsel appearing for the respondents No. 5 and 6 as well as Shri Ratan Pusty, learned counsel appearing for the respondent No.7, contended that there was no necessity for the respondents No. 5 to 7 to face the required test prescribed under Rule 4 of the Rules 2002, as they were working as part time Lecturers in Engineering Colleges/Polytechnics for a long period. The order dated 28.2.2004 may be treated as a draft legislation which led to the amendment of Rules 2002 by Gazette Notification dated 25.5.2004. The appointment of the respondents No.5, 6 and 7 are

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in accordance with law and the State/respondents have full authority to take a policy decision and implement the same by executive instruction/order in the interest of the public.

9. Having heard learned counsel for the parties and perusing the records appended to the petition and return, it is evident that the advertisement for the purpose of appointment on the post of Lecturers in engineering colleges and polytechnics was made before May, 2003, as the last date for submission of the application form was 31st May, 2003. It was clearly stated in the advertisement that the appointments would be made in accordance with the provisions of the existing Rules 2002. The appointment of the respondents No. 5, 6 and 7, on the basis of the order dated 28.2.2004 was contrary to the provisions of the Rules 2002 as the respondents No. 5, 6 and 7 along with other candidates who were working as part time Lecturers were appointed without going through the test/interview as prescribed under Rule 4 of the Rules, 2002.

10. The submissions of learned counsel for the respondents No. 1 to 4 that the order dated 28.2.2004, which admittedly was contrary to the provisions of the Rules 2002, was a policy decision and in the nature of draft legislation, is preposterous and not sustainable in law. Hence, the appointment of the respondents No. 5, 6 and 7 is illegal and contrary to the provisions of law.

11. The so called amendment under the Rules 2002 was brought into force by notification dated 25.5.2004 much after the impugned order dated 28.2.2004 (Annexure P/1) leading to appointment of

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the respondents No. 5 to 7 vide order dated 6.5.2004 (Annexure R-7/2) was passed.

12. The Supreme Court in the case of **P. Mahendran and others Vs. State of Karnataka and others** {(1990) 1 SCC 411} observed as under:-

> "11. .....It is true that a candidate does not get any right to the post by merely making an application for the same, but a right is created in his favour for being considered for the post in accordance with the terms and conditions of the advertisement and the existing recruitment rules. If a candidate applies for a post in response to advertisement issued by Public Service Commission in accordance with recruitment Rules he acquires right to be considered for selection in accordance with the then existing Rules. This right cannot be affected by amendment of any rule unless the amending rule is retrospective in nature. In the instant case the Commission had acted in accordance with the then existing rules and there is no dispute that the appellants were eligible for appointment, their selection was not in violation of the recruitment Rules....."

13. The Supreme Court in the case of **N. T. Devin Katti and others Vs. Karnataka Public Service Commission and others** { (1990) 3 SCC 157} in para 13 observed as under:-

> "13. In Y.V. Rangaiah v. J. Sreenivasa Rao similar question arose relating to recruitment by promotion. The question was whether promotion should be made in accordance with the Rules, in force on the date the vacancies occurred or in accordance with the amended Rules. The Court observed as under: (SCC p. 289, para 9)
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> "The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both

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the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the Statewide basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules."

The same view was taken in P. Ganeshwar Rao v. State of Andhra Pradesh. Similar view was taken in A.A. Calton v. Director of Education. It is a well accepted principle of construction that a statutory rule or government order is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect. Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and government orders and any amendment of the rules or the government order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amended Rules or the amended government orders, issued in exercise of its statutory power either by express provision or by necessary intendment indicate that amended Rules shall be applicable to the pending selections. See P. Mahendran v. State of Karnataka."

14. The Supreme Court in the case of **A. K. Bhatnagar and others Vs. Union of India and others** { (1991) 1 SCC 544 } in para 13 observed as under:-

"13. On more than one occasion this Court has indicated to the Union and the State Governments that once they frame rules, their action in respect of matters covered by rules should be regulated by the rules. The rules framed in exercise of powers conferred

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under the proviso to Article 309 of the Constitution are solemn rules having binding effect. Acting in a manner contrary to the rules does create problem and dislocation. Very often government themselves get trapped on account of their own mistakes or actions in excess of what is provided in the rules. We take serious view of these lapses and hope and trust that the government both at the Centre and in the States would take note of this position and refrain from acting in a manner not contemplated by their own rules. There shall be no order as to costs."

15. The Supreme Court in the case of **Gopal Krushna Rath Vs. M. A. A. Baig (dead) by Lrs. and others** {(1999) 1 SCC 544} in para 6 observed as under:-

"6. When the selection process has actually commenced and the last date for inviting applications is over, any subsequent change in the requirements regarding qualifications by the University Grants Commission will not affect the process of selection which has already commenced. Otherwise it would involve issuing a fresh advertisement with the new qualifications. In the case of P. Mahendran v. State of Karnataka this Court has observed: (SCC p. 416, para 5)

"5. It is well-settled rule of construction that every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect."

The Court further observed that:

"Since the amending Rules were not retrospective, it could not adversely affect the right of those candidate who were qualified for selection and appointment on the date they applied for the post, moreover as the process of selection had already commenced when the amending Rules came into force, the amended Rules could not affect the existing rights of those candidates who were being considered for selection as they

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possessed the requisite qualifications prescribed by the Rules before its amendment."

16. The Supreme Court in the case of **Union of India Through Govt. of Pondicherry and another Vs. V. Ramakrishnan and others** { (2005) 8 SCC 394 } in para 28 observed as under:-

"28. Valid rules made under proviso appended to Article 309 of the Constitution operate so long the said rules are not repealed and replaced. The draft rules, therefore, could not form the basis for grant of promotion, when Rules to the contrary are holding the field. It can safely be assumed that the principle in Abraham Jacob, Vimal Kumari and Gujarat Kishan Mazdoor Panchayat that draft rules can be acted upon, will apply where there are no rules governing the matter and where recruitment is governed by departmental instructions or executive orders under Article 162 of the Constitution."

17. Recently, in the case of **Secretary, State of Karnataka and others Vs. Umadevi (3) and others** { (2006) 4 SCC 1} Constitution Bench of the Supreme Court held as under:

"6. .....Normally, statutory rules are framed under the authority of law governing employment. It is recognized that no government order, notification or circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive,

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the only fair means to adopt is to make appointments based on the rules so framed."

18. For the aforementioned reasons and dicta pronounced by the Supreme Court, the appointment order dated 6.5.2004 (Annexure R-7/2) in favour of the respondents No. 5, 6 and 7, passed on the basis of the order dated 28.2.2004 (Annexure P/1) is quashed, being contrary to the provisions of the Rules, 2002. The respondents No. 1 to 4 may consider appointment of the petitioner on the basis of the select list of the candidates, in accordance with law.

19. The petition is accordingly allowed. No order as to costs.

Sd/-
Satish K. Agnihotri
Judge

Thakur